TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 429

JAMES S. PATTERSON, GENERAL ADMINISTRATOR FOR MOBILE COUNTY, ALABAMA, ETC., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, ET AL., PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1958
CERTIORARI GRANTED NOVEMBER 24, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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[fol. 1]

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Appendix to Appellants' Brief

ALBERT VALLEBUONA,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1954	
Feb. 23	—Libel filed.
Feb. 26	—Affidavit filed re service of a copy of libel.
June 16	—Exceptive allegations filed of U. S. A.
June 23	—Notice filed of hearing on exceptive allegations (returnable July 7, 1954).
July 7	—Byers, J. Hearing Exceptions adjd. 7/21.
July 21	—Inch, J. Hearing on Exceptions held—Decision Reserved. Copies of Original Documents Filed from Washington, D. C.
July 21	—Affidavit of Jacob Rassner filed.
July 22	—By Inch, J. Memo rendered on exceptions. Exceptions sustained. Libel dismissed (See memo on the motion papers).
July 27	—By Inch, J. Order filed on above re dismissal of libel, etc.
Aug. 2	—Notice of Appeal filed (libellant) (Seaman).
1955	
June 17	—Stipulation filed re record on appeal.
June 21	—Papers mailed to U. S. C. A. re appeal.
June 23	—Index filed together with acknowledgment of original papers, etc. (from U. S. C. A.).

[fol. 2]

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased,

v.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1947	
July 30	Filed Libel & Stip. for costs ($100.00 National Surety Corporation).
Nov. 17	Filed Stip. & order extending time to answer. Clerk.
Dec. 17	Filed Stip. & order extending time to answer to 1-15-48. Clerk.
1948	
Jan. 19	Filed Stip. & order extending time to answer to 2-9-48. Clerk.
Jan. 21	Filed Answer of United States of America.
Oct. 7	On Call of Pre-Trial Before Knox, J. Hearing adjourned to 11/9/48.
Nov. 22	On Call of Pre-Trial Before Knox, J. Marked—T. C. (No cal. 11/9/48).
1951	
Feb. 28	Filed Notice of Change of Firm Name.

[fol. 3]

Date	Proceedings
1952	
Mar. 6	Filed Affidavit for adjournment.
Apr. 8	Filed Affidavit for adjournment.
Dec. 2	Filed Affidavit for adjournment.

1953

Sept. 30—Filed notice of appearance for U. S. A.

Sept. 30—Filed affdvt. & notice of motion to dismiss—lack of juris.—Ret. 10-6-53.

Oct. 6—Memo endorsed. Marked off. on request. Weinfeld, J.

1954

Oct. 11—Filed Respondent's exceptive Allegations.

Oct. 13—Filed notice of hearing on exceptive allegations. Ret. 10/28/54.

1955

Feb. 3—Filed Opinion #21680. Dimock, J. Exceptive Allegations sustained. Libel dismissed.

Feb. 9—Filed Order dismissing libel. Dimock, J.

Feb. 14—Filed notice of appeal (Mailed copy to U. S. Atty on 2/14/55).

May 25—Filed stipulation re Record on Appeal.

May 25—Filed notice of Certified Record on Appeal to U. S. C. A.

[fol. 4]

LEONARD LESTER SULLIVAN,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date Proceedings

1953

June 29—Filed libel.

Sept. 30—Filed exceptive allegations to libel.

Sept. 30—Filed notice of motion exceptions to libel—Ret. 10-6-53.

Oct. 6—Memo End. on motion filed 9-30-53—marked off—Weinfeld, J.

1954

Dec. 20—Special pre-trial before Knox, Ch. J.—Hearing held & adjd. to 4/13/55

1955

Feb. 16—Filed stip. & order restoring motion for hearing on respondent's exceptive allegations. Ret. 3/8/55.

Apr. 13—Special pre-trial before Knox, Ch. J. Hearing held. Case Marked off Pre-Trial Calendar.

Apr. 15—Filed opinion #21839 Irving R. Kaufman, J. Exceptive allegations are sustained and the libel dismissed. So ordered.

May 10—Filed notice of appeal. Mailed copy 5/10/55.

May 25—Filed stipulation re: Record on Appeal.

May 25—Filed notice of certified record on appeal to U. S. C. A.

[fol. 5]

STERLING EUGENE DUNCAN,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1953	
June 29	Filed libel.
1954	
Dec. 20	Special pre-trial before Knox, Ch. J.—Hearing held & adjd. to 4/13/55.
1955	
Apr. 13	Special pre-trial before Knox, Ch. J. Hearing held. Case Marked off Pre-Trial Calendar.

Apr. 21—Filed respondent's exceptive allegations.

Apr. 22—Filed notice of hearing on exceptions. Ret. 4/28/55.

July 19—Memo end. on exceptive allegations filed 4/22/55. Exceptive allegations sustained. Submit order. Palmieri, J.

July 27—Filed order sustaining exceptive allegations and dismissing libel. Palmieri, J.

Aug. 8—Filed Notice of Appeal. (Mailed copy 8/8/55).

Oct. 19—Filed Stipulation re record on appeal.

Oct. 19—Filed notice of filing of certified record on appeal.

[fol. 6]

MELVIN A. HAYS,

vs.

UNITED STATES OF AMERICA.

DOCKET ENTRIES

Date	Proceedings
1953	
Dec. 21	Filed libel.
1954	
Mar. 5	Filed affidavit of service upon U. S. Atty and Attorney General.
May 4	Filed answer.
Dec. 10	Filed note of issue for trial.
1955	
Apr. 21	Filed notice of motion re: leave to file exceptive allegations. Ret. 4/26/55.
Apr. 26	Memo. end. on motion papers filed 4/21/55. Motion granted. No opposition. Settle order on notice. Weinfeld, J.

Apr. 28—Filed order granting motion to file exceptive allegations etc. Weinfeld, J.

Apr. 29—Filed respondent's exceptive allegations.

May 2—Filed notice of hearing on respondent's exceptive allegations. Ret. 5/10/55.

July 18—Memo end. on respondent's exceptive allegations filed 5/2/55. Respt's. exceptive allegations are sustained and the libel dismissed. (see memo). Bicks, J.

Aug. 11—Filed notice of appeal. (Mailed copy 8/11/55).

Oct. 19—Filed stipulation re: appeal record.

Oct. 19—Filed notice of filing of certified record on appeal.

[fol. 7]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBEL (SULLIVAN CASE)—Filed June 29, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York:

In Admiralty—Ad. 178-292

The libel of Leonard Lester Sullivan against the United States of America, in an action under the provision of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action:

First: At all the times hereinafter mentioned, the towboat "ILLINOIS" was and still is employed as a tugboat.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the towboat "ILLINOIS".

Third: The libelant was employed aboard the "ILLINOIS" and joined same at a rating of deck-hand, at a regular monthly wage of $275, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful, and competent Master, and skilled, careful, and com- [fol. 8] petent officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances, and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about the 4th day of May, 1952, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously injured, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees, and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about the 4th day of May, 1953, as aforesaid, the libelant, while engaged in the course of his duties aboard the said towboat, was suddenly caused to slip and/or trip against a certain cable, lines or other foreign substance negligently and carelessly maintained on, at and about the deck of the aforementioned towboat; that as a result of slipping or tripping as aforesaid, libelant was caused to strike his back, person and body, with attendant damage to his muscles, tissues, tendons and vessels and to his nerves and nervous system, has suffered, and will

suffer great pain, agony and mental anguish, has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned [fol. 9] as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; and that libelant verily believes he has been permanently injured; all to his damage in the sum of Fifty Thousand ($50,000.00) Dollars.

Seventh: The "ILLINOIS" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action:

Ninth: Libelant realleges each and every allegation contained in paragraphs "First" to "Eighth", inclusive, as fully and completely as though here repleaded at length.

Tenth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-five Thousand ($25,000) Dollars.

Eleventh: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States of America and of this Honorable Court.

Twelfth: On or about the 8th day of September, 1952, a formal claim, pursuant to Public Law 17, was forwarded [fol. 10] to the United States Maritime Administration, Department of Commerce, Washington 25, D. C. and a copy of said claim was mailed to the Attorney-General, Washing-

ton, D. C., a copy to the United States Attorney, Federal Building, New Orleans, Louisiana and a copy to the Federal Barge Lines Inc. at 611 Cavier Street, New Orleans, Louisiana. More than sixty days have elapsed between the filing of the said claim and the filing of this libel, and the said claim is deemed to have been administratively declined.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and singular the premises aforesaid and that libelant may have a decree for the amount of the damages, to wit: Seventy-five Thousand ($75,000) Dollars, together with the costs and disbursements of this action.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address: 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., of Counsel.

(Verified by Jacob Rassner, June 25, 1953.)

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXCEPTIVE ALLEGATIONS OF RESPONDENT, UNITED STATES OF AMERICA—Filed September 30, 1953

The respondent, United States of America, appearing specially herein for the purpose of filing these exceptive allegations and not otherwise, respectfully excepts to the libel for want of jurisdiction of this Honorable Court of the person of the respondent and of the subject matter of this proceeding and alleges upon information and belief as follows:

First: On May 4, 1952, the date upon which the libelant claim (sic) to have been injured, he was a deck hand a member of the crew of the Steamer ILLINOIS, a public vessel of the United States, publicly operated and employed as a merchant vessel.

Second: At the time of the alleged injury to the libelant he was a civilian employee of the United States through

the Department of Commerce, Inland Waterways Corporation, a corporation created pursuant to Title 49 United States Code, Section 151 *et seq.*

Third: As such a civilian employee, the libelant was entitled to the benefits of the Federal Employees' Compensation Act, 5 United States Code, Section 751 *et seq.*, and said remedy was exclusive of all others.

[fol. 12] Wherefore, the respondent prays that the libel herein be dismissed, the proceeding being a suit against it without its consent, not within the scope of the Public Vessels Act, 46 United States Code, Sections 781 to 790 inclusive, nor within the scope of the Suits in Admiralty Act, 46 United States Code, Sections 741 to 752 inclusive, nor sanctioned by any other statute or provision of law.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address: Room 1003, U. S. Court House, Foley Square, New York 7, N. Y.

(Sworn to September 28, 1953.)

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF KAUFMAN, D.J.—April 15, 1955

Appearances:

Jacob Rassner, Proctor for Libelant. Harvey Goldstein of Counsel.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Appearing Specially. Leavenworth Colby, Special Assistant to The Attorney General. Benjamin H. Berman, Attorney, Department of Justice. of Counsel.

IRVING R. KAUFMAN, D.J.

Libelant sues in admiralty for damages for personal injuries allegedly based upon negligence and unseaworthi-

ness and for maintenance and cure. He was employed as a seaman by the United States, through the Inland Waterways Corporation, a wholly owned instrumentality of the United States. The accident took place aboard the ILLINOIS, a ship which was owned, manned and operated by the Inland Waterways Corporation and was employed as a merchant vessel.

[fol. 14] The exceptive allegations now before the Court squarely raise the issue whether libelant's remedy under the Federal Employees Compensation Act, 5 U. S. C. 751 *et seq.*, bars this suit under the Suits in Admiralty Act, 46 U. S. C. 741 *et seq.*

This Court does not write upon a clean slate. In *Johansen* v. *United States*, 343 U. S. 427 (1952) the Supreme Court held that a civilian seaman employee of the United States injured on a "public vessel" was barred from suing the Government under the Public Vessels Act, 46 U. S. Sec. 781 *et seq.*, because his sole and exclusive remedy was under the Federal Employees Compensation Act. On the precise issue presented in this case, the Eighth Circuit, in *Inland Waterways Corp.* v. *Doyle*, 204 F. 2d 874 (1953) held that a civilian seaman employee of the United States injured on a "merchant vessel" could sue under the Suits in Admiralty Act, the Compensation Act being merely an alternative remedy. This holding was expressly followed in *Cowan* v. *Inland Waterways Corp.*, 121 F. Supp. 683 (E. D. Ill. 1954). Judge Dimock of this District in an unreported case, *Patterson* v. *United States* (Ad. 151-223; decided February 2, 1955) held *contra* to *Doyle* and *Cowan*.

The Eighth Circuit felt impelled to its conclusion by certain language in the *Johansen* case. Although the Court of Appeals found some language in *Johansen* which supported the view that the Compensation Act was a bar to a remedy under the Suits in Admiralty Act, it was convinced that other language in *Johansen* dictated its contrary holding. It was with reluctance that the Eighth Circuit held as it did, for the Court said:

> "We have no hesitation in saying that we can conceive of no sound reason for making a distinction with respect to remedies between civilian seamen

employed by the United States on its 'public vessels' and those employed on its 'merchant vessel' * * * We [fol. 15] think that the remedy provided by the Federal Employees' Compensation Act should be exclusive. Our sole concern, however, is with what the law is and not with what it should be" (p. 878).

Actually, in *Johansen*, Justice Reed stated that the Court would review and hold on only the "public vessel" issue, leaving open the "merchant vessel" question.[1] The language in the opinion cuts both ways on the instant question and renders it ambiguous or, at least, "leaves the issue open."[2]

The language of both the Public Vessels Act and the Suits in Admiralty Act *prima facie* would seem to authorize suit by a seaman-employee of the United States. The language and legislative purpose of both Acts are similar. The Suits in Admiralty Act, passed in 1920, waived the Government's sovereign immunity with respect to merchant vessels. In 1925 the Government extended its waiver, in the Public Vessels Act, to all of its vessels by including public vessels within the sphere of liability.
[fol. 16] I can discern no rational basis for granting an election of remedies to a civilian employee of the United

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[1] 343 U. S. at 429, n. 1.: "Since petitioner does not specify the second holding [below] as error, we review only the first * * *" The first holding below left open the "merchant vessel" issue; the second holding relating to a "public vessel".

[2] There is no need to quote the conflicting language in *Johansen*. The Eighth Circuit in *Doyle* devoted two pages of its opinion to this task. Suffice to say that the consistent language dichotomy between "merchant seaman" and "public vessel seamen" present in *Johansen* convinced the *Doyle* Court that an operative distinction was being made by the Supreme Court. However, the issue here is whether those "merchant seamen" *who are also employees of the United States* are to be treated on a parity with "public vessel" seamen who are always employees of the United States or on a parity with those "merchant seamen" who are not Government employees. The dichotomy employed in *Johansen* does not appear to be aimed at the tri-partite classification involved in the instant case.

States aboard a merchant vessel when his counterpart aboard a public vessel is denied such an election.[3]
[fol. 17] The exceptive allegations are sustained and the libel dismissed. So ordered.

Dated: New York, N. Y., April 15, 1955.

Irving R. Kaufman, U. S. D. J.

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[3] The only basis upon which a distinction of some substance could be drawn would be predicated upon the approach the Supreme Court in *Johansen* took: exclusivity of the Compensation Act is to be presumed [because a comprehensive compensation plan is a "socially desirable rule" (343 U. S. at 439)] to have been the intent of Congress unless a later remedial statute, which appears only generally to grant a right to federal employees already covered by the Compensation Act, specifically provides an election. It was clear at the time the Public Vessels Act was passed in 1925, which appeared generally to cover public-vessel seamen, that such seamen had already been given a remedy under the 1916 Compensation Act. On the other hand, at the time of the passage of the Suits in Admiralty Act in 1920, which appeared generally to grant a right to all merchant seamen, it was not clear whether any or all of such seamen were covered by the Compensation Act because of the many and varied methods employed by the United States in the operation of such merchant vessels. Some vessels were directly chartered to private operators by the United States, others were privately operated under charter from an incorporated or unincorporated instrumentality of the United States and others were operated by private agencies for one of the instrumentalities. In some instances the private entity paid the seamen; in other cases the United States or one of its instrumentalities paid the seamen directly or indirectly through its private agent. See *Robinson on Admiralty*, p. 248. Again, many of the charters varied as to the extent of governmental supervision over the seamen. As a result, it was often difficult to determine whether a particular merchant seaman was an "employee of the United States" under the 1916 Act [39 Stat. 750; 39 Stat. 742]. See *Johansen* at 434-35: "Merchant seamen * * * had a right to libel the United States pursuant to the Suits in Admiralty Act of 1920, *but whether they were entitled to the benefits of the Compensation Act was doubtful*," citing: Comptroller General's Decision A-31684, Sept. 10, 1930; 34 Op. Atty. Gen. 363; *Johnson* v. *Fleet Corp.*, 280 U. S. 320. It may reasonably be concluded, *if this approach is accepted*, that if Congress itself at the time the Suits in Admiralty Act was passed in 1920 (as well as the courts) was unsure of the extent to which the various classes of merchant seamen were already covered by the 1916 Compensation Act, then it cannot be presumed that it intended the Compensation Act to be exclusive. [The Compensa-

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 151-223

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, as Administrator of the Estate of EDGAR A. DOODY, JR., deceased, Libelant,

against

UNITED STATES OF AMERICA, Respondent.

LIBEL—Filed July 30, 1947

To the Honorable Judges of the United States District Court for the Southern District of New York:

The libel of James S. Patterson, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased, against the United States of America in an action under the Public Vessels Act, Suits in Admiralty Act, and Public Law 17, for the recovery of damages for wrongful death.

First: That prior to the commencement of this action, and on the 27th day of May, 1947, a formal claim, pursuant to Public Law No. 17—78th Congress (H. R. 133) was forwarded to the War Shipping Administration and due notice of said claim was received by War Emergency

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tion Act was subsequently amended to include for the first time or to reaffirm the past coverage of "employees of instrumentalities of the United States wholly owned by the United States" 5 U. S. C. 790]. However, this essentially historical approach is entirely unworkable if the Suits in Admiralty Act is to be placed "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres* v. *United States*, 340 U. S. 135, 139 (1950), cited in *Johansen* at 432. In each instance, the courts would be called upon to determine whether, under the law as it existed in 1920, Congress (or the courts) considered a merchant seaman in plaintiff's position, in terms of the Government's relationship to him, to have been already covered by the 1916 Compensation Act.

Tankers, Inc., agent and operator of the S.S. Hanging Rock. More than sixty (60) days have elapsed since the filing of said claim, and said claim is deemed to have been administratively disallowed.

[fol. 19] Second: That at all the times hereinafter mentioned, the respondent was and is a corporation sovereign, which has by law consented to be sued.

Third: That prior to the commencement of this action, James S. Patterson, General Administrator for Mobile County, Alabama, was duly appointed Administrator of the Estate of Edgar A. Doody, Jr., deceased.

Fourth: That upon information and belief, that at all the times hereinafter mentioned, the respondent was the owner of a certain steamship or vessel known as the S.S. Hanging Rock.

Fifth: That at all the times hereinafter mentioned, the respondent managed, operated and controlled the aforementioned vessel.

Sixth: That at all the times hereinafter mentioned, the decedent, Edgar A. Doody, Jr., was employed aboard the aforementioned vessel in the capacity of seaman.

Seventh: That at all the times hereinafter mentioned, all the officers and crew of the aforementioned vessel were in the employ of the respondent.

Eighth: That the Admiralty Division of the United States District Court for the Southern District of New York has jurisdiction of the subject matter as well as the parties to the action.

Ninth: That this Court has jurisdiction of the above entitled action by reason of the Public Vessels Act.

Tenth: That this Court has jurisdiction of the above entitled action by reason of the Suits in Admiralty Act.

[fol. 20] Eleventh: That this Court has jurisdiction of the above entitled action by reason of Public Law 17.

Twelfth: That at all the times hereinafter mentioned, there was in force and effect a law commonly known as the Jones Act, to the benefit of which the libelant is entitled.

Thirteenth: That at all the times hereinafter mentioned, the libelant was and still is a resident of the State of Alabama.

Fourteenth: That at the time of the filing of this libel, the aforementioned vessel was within the jurisdiction of this Court.

Fifteenth: That on or about the 1st day of August, 1945, the libelant's decedent suffered injuries to his person which resulted in his death.

Sixteenth: That on or about the 1st day of August, 1945, while the decedent was properly, carefully, prudently engaged in the performance of his duties aboard the vessel aforementioned, he was suddenly and without any notice or warning caused to suffer injuries and death, by reason of the carelessness, recklessness and negligence of the respondent, its agents, servants and employees, in failing, neglecting and omitting to have its vessel maintained in a reasonably safe state of repairs and in a seaworthy condition; in failing to provide the decedent with a reasonably safe place wherein to work and in addition that an explosion occurred aboard the vessel aforementioned as a result of defective and dangerous machinery, gear and equipment aboard the vessel, all of which resulted in the decedent suffering injuries to his head, including a fracture of the skull and other injuries, resulting in conscious pain and suffering and subsequent death, and the respondent was otherwise careless, reckless and negligent in the premises.

[fol. 21] Seventeenth: That as a result of the accident aforementioned, the decedent suffered conscious pain, mental anguish and physical suffering from the time he suffered his injuries up to the time of his death.

Eighteenth: That the decedent died leaving him surviving his widow, Margie D. Doody Ellett, and an infant daughter, Charlotte Ann Doody, on whose behalf this action is being brought.

Nineteenth: That by reason of the foregoing, the Estate, heirs at law and next of kin of Edgar A. Doody,

Jr., sustained damages in the sum of Seventy-five Thousand ($75,000.00) Dollars.

Twentieth: That all and singular the foregoing matters are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court, and that the respondent be required to answer upon oath, all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the sum of Seventy-five Thousand ($75,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 220 Broadway, Borough of Manhattan, City of New York.

(Verified July 28, 1947.)

[fol. 22]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANSWER—Filed January 21, 1948

To the Honorable Judges of the United States District Court for the Southern District of New York:

The answer of the respondent, United States of America, to the libel of James S. Patterson, General Administrator for Mobile County, Alabama, as Administrator of the Estate of Edgar A. Doody, Jr., deceased, in an alleged cause of action under the Suits in Admiralty Act of 1920, the Public Vessels Act, and Public Law 17, alleges, upon information and belief, and shows to this Honorable Court as follows:

First: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "First" of said libel.

Second: Respondent admits that it is a sovereign power which has by law consented to be sued, but only in accordance with the statutes enacted for that purpose, and, except as expressly admitted herein, denies each and every allegation contained in Article "Second" of said libel.

Third: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Third" of said libel.

Fourth: Respondent admits each and every allegation contained in Article "Fourth" of said libel.

Fifth: Respondent admits each and every allegation contained in Article "Fifth" of said libel.

Sixth: Respondent denies each and every allegation contained in Article "Sixth" of said libel.

[fol. 23] Seventh: Respondent admits each and every allegation contained in Article "Seventh" of said libel.

Eighth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eighth" of said libel.

Ninth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Ninth" of said libel.

Tenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Tenth" of said libel.

Eleventh: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eleventh" of said libel.

Twelfth: Respondent admits that, at the times mentioned in the libel, there was in force and effect a law commonly known as the Jones Act, and, except as expressly admitted herein, denies each and every allegation contained in Article "Twelfth" of said libel.

Thirteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Thirteenth" of said libel.

Fourteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Fourteenth" of said libel.

Fifteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Fifteenth" of said libel.

[fol. 24] Sixteenth: Respondent denies each and every allegation contained in Article "Sixteenth" of said libel.

Seventeenth: Respondent denies each and every allegation contained in Article "Seventeenth" of said libel.

Eighteenth: Respondent denies any knowledge or information sufficient to form a belief as to each and every allegation contained in Article "Eighteenth" of said libel.

Nineteenth: Respondent denies each and every allegation contained in Article "Nineteenth" of said libel.

Twentieth: Respondent admits that all and singular the foregoing matters are within the Admiralty and Maritime jurisdiction of the United States of America and of this Honorable Court, and, except as expressly admitted herein, denies each and every allegation contained in Article "Twentieth" of said libel.

Further Answering, the Respondent Alleges:

Twenty-first: Any injuries sustained by the deceased, as alleged in the libel, were due solely to and caused by the deceased's own negligence and not caused by or contributed to in any manner or by any negligence on the part of the respondent.

Twenty-second: Deceased's duties had certain risks incident thereto which were obvious and well known to the deceased at the time he entered upon his employment, and if the deceased sustained any injuries, as alleged in the libel, such injuries arose out of and were incident to said risks, all of which were taken and assumed by the deceased at the time he entered upon such employment and during the continuance thereof.

[fol. 25] Twenty-third: That, heretofore, and prior to the filing of the libel herein, Margie D. Doody, the widow of the

deceased, filed, on behalf of herself and her minor daughter, Charlotte Ann Doody, a claim with the Governor of the Panama Canal, who administers the United States Employees Compensation Act in the Canal Zone, pursuant to the provisions of Title 5 U. S. C. A. Section 793. That such proceedings were had thereon that thereafter she was allowed and accepted compensation in the total sum of $1,852.38, as a final award, approved on August 21, 1945, by the Governor of the Panama Canal. That by applying for and accepting compensation, under the United States Employees' Compensation Act, she elected her remedy and surrendered any right of action she may have had against the United States of America under either the Suits in Admiralty Act, 46 U. S. C. A. Section 741, et seq.; the Public Vessels Act, 46 U. S. C. A. Section 781, et seq., or Public Law 17, U. S. C. A. Appendix Section 1291.

Wherefore, respondent prays that the libel herein be dismissed with costs.

John F. X. McGohey, U. S. Attorney for the Southern District of New York, Proctor for Respondent.

Messrs. Dorsey & Adams, Of Counsel to the Proctor for Respondent, Office & P. O. Address, 44 Wall Street, New York 5, N. Y.

(Sworn to on January 19, 1948.)

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—
Filed October 11, 1954

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

1. At all times set forth in the libel, libelant's decedent, Edgar A. Doody, Jr., was a machinist, Mechanical Division, The Panama Canal, and a civil service shore employee of

the United States through the mechanical division of the Panama Canal, an unincorporated agency of the United States.

2. At all times set forth in the libel, the Oil Tanker SS Hanging Rock, referred to in article Fourth of the libel, was a public vessel of the United States, publicly owned and publicly operated by the War Shipping Administration and employed as a merchant vessel.

3. Upon information and belief, on or about August 1, 1945, libelant's decedent was fatally injured while in the actual performance of his duties at about 1:20 a. m. on that date, while engaged in checking the speed of a boiler feed pump turbine aboard the SS Hanging Rock and died late the same day at Gorgas Hospital Canal Zone, as a result of his injuries.

4. Thereafter, pursuant to the provisions of the Federal Employees' Compensation Act, 5 U. S. C. A., 751 [fol. 27] et seq., an award of compensation was duly made and entered on August 21, 1945, directing payment from the Employees' Compensation Fund of $61.25 per month to Margie D. Doody, the widow of Edgar A. Doody, Jr., and $17.50 to Margie D. Doody, as guardian of Charlotte A. Doody, the minor daughter of libelant's decedent.

5. Pursuant to and in accordance with the terms of the compensation order awarding compensation on account of the death of libelant's decedent, payments referred to in paragraph 4 hereof, were duly made to Margie D. Doody until her remarriage in January of 1947 and said payments were accepted and retained.

6. Pursuant to and in accordance with the terms of the compensation order awarding compensation on account of the death of libelant's decedent, payments referred to in paragraph 4 hereof, were duly made to Margie D. Doody, as guardian of Charlotte A. Doody, and said payments have been accepted and retained.

7. By reason of the premises, the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy

for the death of libelant's decedent lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent Appearing Specially, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

[fol. 28]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF DIMOCK, D. J.—Filed February 2, 1955

Appearances:

Jacob Rassner, Esq., Proctor for Libelant, 15 Park Row, New York 38, N. Y., Harvey Goldstein, Esq., of Counsel.

Honorable J. Edward Lumbard, United States Attorney, Proctor for Respondent, Appearing Specially, 607 U. S. Court House, Foley Square, New York 7, N. Y., Leavenworth Colby, Esq., Special Assistant to the Attorney General, Benjamin H. Berman, Esq., Attorney, Department of Justice, of Counsel.

DIMOCK, D. J.

Libelant, as administrator of the estate of Edgar A. Doody, Jr., deceased, sues in admiralty under the Suits in Admiralty Act as amended and supplemented, 46 U. S. C. 741 et seq., to recover damages for the intestate's death. It is alleged that he was employed on board the government owned vessel SS Hanging Rock and that his death resulted from the negligence and unseaworthiness of the ship.

The Government has filed exceptive allegations raising the point that libelant has a remedy under the Federal Employees' Compensation Act, as amended, 5 U. S. C. § 751 et seq., and that that remedy is exclusive.

[fol. 29] The parties agree that the SS Hanging Rock was owned and operated by the Government through the War Shipping Administration. This might be significant as indicating that the decedent had no remedy under the Federal Employees' Compensation Act since the Clarification Act, 50 U. S. C. App. § 1291, provides that members of crews employed on vessels "as employees of the United States through the War Shipping Administration" shall "not be considered as employees of the United States for the purposes of the United States Employees' Compensation Act, as amended". Nowhere, however, is there any indication that libelant's intestate was employed by the Government through the War Shipping Administration. Indeed the Government alleges in its exceptive allegations without contradiction that decedent was a civil service employee of the United States through the mechanical division of the Panama Canal, an unincorporated agency of the United States. Since it is thus not even contended that decedent was employed through the War Shipping Administration it cannot be said that he is by the terms of the Clarification Act excluded from the benefits of the Federal Employees' Compensation Act. I therefore agree with the Government that libelant has a remedy under the Federal Employees' Compensation Act.

As authority on its position that the remedy is exclusive, the Government cites Johansen v. United States, 343 U. S. 427, where suit was brought for personal injuries under the Public Vessels Act, 46 U. S. C. § 781 et seq., and the Supreme Court held the Federal Employees' Compensation Act exclusive. The Public Vessels Act provides that a libel in personam may be brought against the United States for damages caused by "a public vessel of the United States", 46 U. S. C. §781. The suits in Admiralty Act provides that in cases where a proceeding in admiralty could be brought against a vessel owned by the United [fol. 30] States if the vessel had been privately owned a libel in personam may be brought against the United States provided that such vessel is employed as "a merchant vessel", 46 U. S. C. § 742.

Libelant points to a statement in the exceptive allegations that the Hanging Rock was a merchant vessel. If that is so, but for any exclusive effect of the Federal Employees' Compensation Act, libelant's rights would be gov-

erned by the Suits in Admiralty Act, Geo. W. Rogers Const. Corp. v. United States, D. C. N. D. N. Y., 118 F. Supp. 927, 934. Libelant thus attempts to distinguish Johansen v. United States, 343 U. S. 427, supra, where the libelant's rights, but for the exclusive effect of the Federal Employees' Compensation Act, would have been governed by the Public Vessels Act. In this attempt libelant is supported by Inland Waterways Corporation v. Doyle, 8 Cir., 204 F. 2d 874, which held that the remedy under the Federal Employees' Compensation Act was not exclusive of a remedy under the Suits in Admiralty Act.

The court in the Inland Waterways case admitted, p. 878, that it "could conceive of no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States upon its 'public vessels' and those employed on its 'merchant vessels' ". Nevertheless the court felt that the opinion in the Johansen case indicated that the remedy under the Federal Employees' Compensation Act was not exclusive of the remedy under the Suits in Admiralty Act.

Libelant has not suggested any sound reason for making a distinction with respect to remedies on the one hand available under the Public Vessels Act because public vessels are involved and on the other hand available under the Suits in Admiralty Act involving merchant vessels. I therefore agree with the Inland Waterways opinion that there is no sound reason for such a distinction. I disagree, [fol. 31] however, with the Eighth Circuit's interpretation of the Johansen opinion as holding that the remedy under the Federal Employees' Compensation Act was not exclusive of the remedy under the Suits in Admiralty Act. Indeed, while the Supreme Court ostensibly refused to pass upon that question (p. 429 n. 1), other language in the opinion indicates that it viewed the Federal Employees' Compensation Act remedy as exclusive of that under the Suits in Admiralty Act. On page 439 the court said, "See also United States v. Marine, 155 F. 2d 456, a case allowing recovery to a civilian employee of the Government under the Suits in Admiralty Act, and Johnson v. United States, 186 F. 2d 120, which allowed a recovery under the Public Vessels Act to a civilian seaman on a public vessel. The

opinions below in the cases we are considering take the opposite and, we think, the better view."

While all might not agree with the Supreme Court that the lower courts in the Johansen case had expressed a view on the question of the exclusiveness of the Federal Employees' Compensation Act remedy with reference to the Suits in Admiralty Act remedy, no one after reading the above quoted language can gainsay that the Supreme Court said that it regarded the denial of recovery under the Suits in Admiralty Act as the better view.

The same considerations apply whether the ship is a public ship or a merchant ship and I hold that the remedy under the Federal Employees' Compensation Act is exclusive of the remedy under the Suits in Admiralty Act.

The exceptive allegations are sustained and the libel dismissed.

Dated: February 2, 1955.

E. J. Dimock, United States District Judge.

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER SUSTAINING EXCEPTIVE ALLEGATIONS AND DISMISSING LIBEL—February 9, 1955

The respondent, appearing specially, having filed exceptive allegations herein and said exceptive allegations having been duly brought on for hearing before this Court on December 2, 1954.

Now, on reading the libel and respondent's exceptive allegations and after hearing J. Edward Lumbard, United States Attorney (Leavenworth Colby, Esq., Special Assistant to the Attorney General, and Benjamin H. Berman, Esq., Attorney, Department of Justice, of counsel), proctor for the respondent, in support of said exceptive allegations and Jacob Rassner, Esq. (Harvey Goldstein, Esq., of counsel), proctor for the libelant, in opposition thereto, and upon filing the opinion of the Court, it is

On motion of J. Edward Lumbard, United States Attorney, proctor for the respondent, appearing specially,

Ordered that the respondent's exceptive allegations be and the same hereby are sustained and the libel herein be and the same hereby is dismissed.

Dated: New York, N. Y., February 9, 1955.

E. J. Dimock, United States District Judge.

[fol. 33]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LIBEL (DUNCAN CASE)—Filed June 29, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York

In Admiralty—Ad. 178-291

The libel of Sterling Eugene Duncan against the United States of America, in an action under the provisions of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action

First: At all the times hereinafter mentioned, the towboat "Baton Rouge" was and still is employed as a tugboat.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the towboat "Baton Rouge".

Third: The libelant was employed aboard the "Baton Rouge" and joined same at a rating of fireman, at a regular monthly wage of $270.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers

and co-employees; to provide libelant with a skilled, careful, and competent Master, and skilled, careful and competent [fol. 34] officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances, and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about and between the 20th day of December, 1950 and the 7th day of November, 1951, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees, and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about and between the 20th day of December, 1950 and the 7th day of November, 1951 and during the course of his employment as aforesaid, the libelant was compelled or required to live aboard the vessel in quarters which were defective, negligently and improperly maintained, unsafe and dangerous to his health in that the said quarters were not inhabitable and were unseaworthy; in that the said quarters were maintained and permitted and allowed by the respondent to become and remain in a damp, wet, unsafe, poorly ventilated and uninhabitable condition; that while so engaged in his duties on board the said towboat on and between said dates the respondent failed to provide the libelant with a safe place [fol. 35] wherein to work and with reasonably safe and proper equipment to work with; and by reason of other negligence in the premises, and as result of all the foregoing the libelant was thereby caused to contract or develop a

pulmonary tuberculosis disease or illness or other infection of his chest, or was caused to aggravate a previous condition of said disease or illness, dormant and non-developed amongst other things, and libelant became ill at and about his body or person with attendant injury to his nerves and nervous system, has suffered, and will suffer, great pain, agony and mental anguish, has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost, and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; and that libelant verily believes he has been permanently injured; all to his damage in the sum of Seventy-Five Thousand ($75,000.00) Dollars.

Seventh: The "Baton Rouge" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action

Ninth: Libelant realleges each and every allegation contained in paragraphs "First" to "Eighth", inclusive, as fully and completely as though here repleaded at length.

[fol. 36] Tenth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-Five Thousand ($25,000.00) Dollars.

Eleventh: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States of America and of this Honorable Court.

Twelfth: On or about the 15th day of September, 1952, a formal claim, pursuant to Public Law 17, was forwarded to the United States Maritime Administration, Department of Commerce, Washington 25, D. C. and a copy of said claim was mailed to the Attorney-General, Washington, D. C., a copy to the United States Attorney, Federal Building, New Orleans, Louisiana and a copy to the Federal Barge Lines Inc. at 611 Gavier Street, New Orleans, Louisiana. More than sixty days have elapsed between the filing of the said claim and the filing of this libel, and the said claim is deemed to have been administratively declined.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and singular the premises aforesaid and that libelant may have a decree for the amount of the damages, to wit: One Hundred Thousand ($100,000.00) Dollars, together with the costs and disbursements of this action.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., Of Counsel.

(Verified by Jacob Rassner, June 25, 1953.)

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed April 21, 1955

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

I. At all times set forth in the libel the towboat Baton Rouge, the vessel referred to in Article Second of the libel, was a public vessel of the United States, publicly operated and employed as a merchant vessel.

2. At the time of the injury alleged in the libel, libelant, a fireman and member of the crew of the towboat Baton Rouge, was a civilian employee of the United States through the Inland Waterways Corporation, a wholly owned incorporated agency of the United States created pursuant to the provisions of Title 49 U. S. C. 151 et seq.

3. As such civilian employee, libelant was entitled to the benefits of the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

4. By reason of the premises the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

[fol. 38] Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent Appearing Specially, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM ENDORSED ON MOTION PAPERS

Jul 19, 1955

Exceptive allegations sustained. Submit order.

Edmund L. Palmieri, U. S. D. J.

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER SUSTAINING EXCEPTIVE ALLEGATIONS AND DISMISSING LIBEL—July 26, 1955

The respondent, appearing specially, having filed exceptive allegations herein and said exceptive allegations having duly been brought on for hearing before this Court on July 19, 1955,

Now, on reading respondent's notice of hearing dated April 22, 1955, and libel herein and respondent's exceptive allegations and after hearing Lloyd F. MacMahon, United States Attorney (Benjamin H. Berman, Esq., Attorney, Department of Justice, of Counsel), proctor for the respondent, appearing specially, and Jacob Rassner (Harvey Goldstein, Esq., of Counsel), proctor for the libelant, it is

On motion of Lloyd F. MacMahon, United States Attorney, proctor for the respondent herein,

Ordered that respondent's exceptive allegations herein be and the same hereby are sustained; and it is

Further Ordered that the libel herein be and the same hereby is dismissed.

Dated: New York, N. Y., July 26, 1955.

Edmund L. Palmieri, United States District Judge.

[fol. 40]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBEL (HAYS CASE)—Filed December 21, 1953

To the Honorable Judges of the United States District Court for the Southern District of New York:

In Admiralty—Ad. 180-226

The libel of Melvin A. Hays against the United States of America, in an action under the provisions of the Suits in Admiralty Act of 1920, for the recovery of damages for injuries sustained and for maintenance and cure, respectfully alleges, on information and belief:

For a First Cause of Action:

First: At all the times hereinafter mentioned, the steamer "Missouri" was and still is employed as a merchant vessel.

Second: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the steamer "Missouri".

Third: The libelant was employed aboard the "Missouri" and joined same at a rating of deck-hand, at a regular monthly wage of $275.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Fourth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful and competent Master, and skilled, careful and competent [fol. 41] officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials and appliances in and for the performance of his work; to maintain the same in proper

condition for the proper performance of the said work; to promulgate and enforce proper rules in relation to the foregoing and to inspect the aforesaid materials, appliances and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Fifth: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953 through on or about February, 1953, while libelant was acting within the scope of his employment, and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees and other persons for whom the respondent was responsible, and in violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Sixth: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953, through on or about February, 1953, and during the course of his employment as aforesaid, libelant was compelled or required to live aboard the said vessel in quarters which were unsafe, defective, negligently and improperly maintained and dangerous to his health; in that the said quarters were not inhabitable and were unseaworthy; in that the negligent and improperly maintained condition of these quarters and the surrounding area thereof caused the said quarters to be and constantly remain in a damp, wet, unsafe, poorly ventilated [fol. 42] and poor condition; and by reason of other negligence and carelessness in the premises, libelant was thereby caused to contract or develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to aggravate a previous condition of said disease or illness dormant and non-disabling, amongst other things and libelant became ill at or about his body and person with attendant damage to his nerves and nervous system, has suffered and will suffer great pain, agony and mental anguish, and has paid out and will pay out, large sums of

money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the expense of his maintenance and cure; that libelant verily believes he has been permanently injured, all to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Seventh: The "Missouri" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

Eighth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Second Cause of Action:

Ninth: Libelant realleges each and every allegation contained in paragraphs "First", "Second", "Third", "Fourth" and "Seventh" as fully and completely as though here repleaded at length.

[fol. 43] Tenth: It was the absolute and non-delegatable duty of the respondent to furnish libelant with a safe and seaworthy vessel, which duty respondent failed to carry out, thereby causing libelant to sustain injuries hereinafter described, to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Eleventh: That on or about and between the month of October, 1952 through on or about November, 1952, and from on or about January, 1953 through on or about February, 1953, as a result of the failure of the respondent, its officers, servants, agents and/or employees to provide the libelant with a safe and seaworthy vessel and safe and seaworthy appurtenances, the libelant was caused to sustain a severe, painful and permanent illness to his person.

Twelfth: That by reason of the foregoing, libelant was caused to contract and develop a pulmonary tuberculosis

disease or illness, or other illness, or was caused to reactivate or aggravate a previous condition of said disease or illness dormant and non-disabling, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligation for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured.

Thirteenth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof.

For a Third Cause of Action.

Fourteenth: At all the times hereinafter mentioned, the steamer "Illinois" was and still is employed as a merchant vessel.

[fol. 44] Fifteenth: The respondent, the United States of America, at all the times hereinafter mentioned, through the Inland Waterways Corporation, a corporation whose stock is wholly owned by the United States of America, owned, manned, operated, managed and controlled the steamer "Illinois".

Sixteenth: The libelant was employed aboard the "Illinois" and joined same at a rating of deck hand, at a regular monthly wage of $275.00, together with bonus, overtime, and maintenance, all under the customary ship's articles, and, at all the times hereinafter mentioned, except as otherwise set forth, continued in such employment.

Seventeenth: It was the obligation and duty of the respondent to furnish libelant with an adequate number of officers and co-employees; to provide libelant with a skilled, careful and competent Master, and skilled, careful and competent officers and co-employees; to furnish libelant with a safe place in which to do his work; to supply him with suitable and safe means, materials and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work; to promulgate and enforce proper rules

in relation to the foregoing and to inspect the aforesaid materials, appliances and means; to provide libelant with a safe and seaworthy vessel; and to warn the libelant of the dangers to be encountered in the performance of the said work.

Eighteenth: That on or about and between the months of December, 1952 and January, 1953, while libelant was acting within the scope of his employment and in the interests of the respondent herein, he was caused to become seriously ill, as hereinafter more fully described, all by reason of the carelessness and negligence of the respondent, its officers, agents, servants, employees and other persons for whom the respondent was responsible, and in [fol. 45] violation of the aforesaid duty and obligation, without any fault or negligence upon the part of the libelant herein.

Nineteenth: That on or about and between the months of December, 1952 and January, 1953, and during the course of his employment as aforesaid, libelant was compelled or required to live aboard the said vessel in quarters which were unsafe, defective, negligently and improperly maintained and dangerous to his health; in that the said quarters were not inhabitable and were unseaworthy; in that the negligent and improperly maintained condition of these quarters and the surrounding area thereof caused the said quarters to be and constantly remain in a damp, wet, unsafe, poorly ventilated and poor condition; and by reason of other negligence and carelessness in the premises, libelant was thereby caused to contract or develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to aggravate a previous condition of said illness or disease dormant and non-disabling, amongst other things and libelant became ill at or about his body and person with attendant damage to his nerves and nervous system, has suffered and will suffer great pain, agony and mental anguish, and has paid out and will pay out, large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced

to defray the expense of his maintenance and cure; that plaintiff verily believes he has been permanently injured, all to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Twentieth: The "Illinois" is now, or will be at the time of serving and filing this libel, or during the pendency of this action, within the territorial jurisdiction of the United States.

[fol. 46] Twenty-first: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof, and the provisions of Merchant Marine Act of 1920, commonly known as the "Jones Act", and all acts and statutes supplemental thereto and amendatory thereof.

For a Fourth Cause of Action.

Twenty-second: Libelant realleges each and every allegation contained in paragraphs "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth" and "Twentieth" as fully and completely as though here repleaded at length.

Twenty-third: It was the absolute and non-delegatable duty of the respondent to furnish libelant with a safe and seaworthy vessel, which duty respondent failed to carry out, thereby causing libelant to sustain an illness hereinafter described, to his damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Twenty-fourth: That on or about and between the months of December, 1952 and January, 1953, as a result of the failure of the respondent, its officers, servants, agents and/or employees to provide the libelant with a safe and seaworthy vessel and safe and seaworthy appurtenances, the libelant was caused to sustain severe, painful and permanent illness to his person as hereinafter set forth.

Twenty-fifth: That by reason of the foregoing, libelant was caused to contract and develop a pulmonary tuberculosis disease or illness, or other illness, or was caused to reactivate or aggravate a previous condition of said disease or illness dormant and non-disabling, and was in-

capacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligation for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured.

[fol. 47] Twenty-sixth: This suit is brought under the provisions of the Suits in Admiralty Act and all acts and statutes supplemental thereto and amendatory thereof.

For a Fifth Cause of Action.

Twenty-seventh: Libelant realleges each and every allegation contained in paragraphs "First" to "Twenty-sixth" inclusive, as fully and completely as though here repleaded at length.

Twenty-eighth: The aforesaid injuries were sustained in the line of his duties while actually engaged in the ship's business, without any fault or negligence on his part. The libelant sues hereunder for maintenance and cure and alleges the case amounts to Twenty-five Thousand ($25,000.00) Dollars.

Twenty-ninth: All and singular the premises are true and within the Admiralty and Maritime Jurisdiction of the United States of America and of this Honorable Court.

Wherefore, the libelant prays that the respondent, the United States of America, be required to appear and answer all and sigular the premises aforesaid and that libelant may have a decree for the amount of the damages to wit: One Hundred and Twenty-five Thousand ($125,000.00) Dollars, together with the costs and disbursements of this action.

Herman N. Rabson, Proctor for Libelant, Office & P. O. Address, 15 Park Row, New York 38, New York.

S. Eldridge Sampliner, Esq., of Counsel.

(Verified by Herman N. Rabson, December 21, 1953.)

[fol. 48]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANSWER—File May 4, 1954

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of the respondent to the libel of Melvin A. Hays, alleges upon information and belief:

As to the First Cause of Action:

First: It denies the truth of the allegations of Article First.

Second: It admits that, at the times of the events mentioned in the libel, Inland Waterways Corporation was a corporation whose stock was wholly owned by it and that it, through Inland Waterways Corporation, owned, manned, operated, managed and controlled the Steamer Missouri. Except as so admitted, it denies the truth of the remaining allegations of Article Second.

Third: It admits that the libelant was at one time employed aboard the steamer Missouri as an inexperienced deck hand at a daily wage of $7.44. Except as so admitted, it denies the truth of the remaining allegations of Article Third.

Fourth: It denies the truth of the allegations of Article Fourth.

[fol. 49] Fifth: It denies the truth of the allegations of Article Fifth.

Sixth: It denies the truth of the allegations of Article Sixth.

Seventh: It denies the truth of the allegations of Article Seventh.

Eighth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Eighth. It denies that the libelant is entitled to maintain this suit

under the provisions of the Suits in Admiralty Act and or the Jones Act, so-called.

As to the Second Cause of Action:

Ninth: The respondent repeats and realleges each and every allegation in paragraphs "First", "Second", "Third", "Fourth" and "Seventh" with the same force and effect as if herein set forth at length and in addition thereto alleges:

Tenth: It denies the truth of the allegations of Article Tenth.

Eleventh: It denies the truth of the allegations of Article Eleventh.

Twelfth: It denies the truth of the allegations of Article Twelfth.

Thirteenth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Thirteenth. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act.

As to the Third Cause of Action:

Fourteenth: It denies the truth of the allegations of Article Fourteenth.

[fol. 50] Fifteenth: It admits that, at the times of the events mentioned in the libel, Inland Waterways Corporation was a corporation whose stock was wholly owned by it and that it, through Inland Waterways Corporation, owned, manned, operated, managed and controlled the steamer Illinois. Except as so admitted, it denies the truth of the remaining allegations of Article Fifteenth.

Sixteenth: It admits that the libelant was at one time employed aboard the steamer Illinois as an inexperienced deck hand at a daily wage of $7.44. Except as so admitted, it denies the truth of the remaining allegations of Article Sixteenth.

Seventeenth: It denies the truth of the allegations of Article Seventeenth.

Eighteenth: It denies the truth of the allegations of Article Eighteenth.

Nineteenth: It denies the truth of the allegations of Article Nineteenth.

Twentieth: It denies the truth of the allegations of Article Twentieth.

Twenty-first: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Twenty-first. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act and or the Jones Act, so-called.

As to the Fourth Cause of Action:

Twenty-second: The respondent repeats and realleges each and every allegation in paragraph "Fourteenth", "Fifteenth", "Sixteenth", "Seventeenth" and "Twentieth" with the same force and effect as if herein set forth at length and in addition thereto alleges:

fol. 51] Twenty-third: It denies the truth of the allegations of Article Twenty-third.

Twenty-fourth: It denies the truth of the allegations of Article Twenty-fourth.

Twenty-fifth: It denies the truth of the allegations of Article Twenty-fifth.

Twenty-sixth: It is without knowledge sufficient to form a belief as to the truth of the allegations of Article Twenty-sixth. It denies that the libelant is entitled to maintain this suit under the provisions of the Suits in Admiralty Act.

As to the Fifth Cause of Action:

Twenty-seventh: The respondent repeats and realleges each and every allegation in paragraphs "First" to "Twenty-

sixth" inclusive with the same force and effect as if herein set forth at length and in addition thereto alleges:

Twenty-eighth: It denies the truth of the allegations of Article Twenty-eighth.

Twenty-ninth: It denies the truth of the allegations of Article Twenty-ninth.

Further Answering the Libel Herein,
United States of America Says:

Thirtieth: If the libelant was injured as alleged in the libel, said injuries were caused in whole or in part by his own negligence or by the negligence of persons for whose conduct this respondent is not responsible.

[fol. 52] Further Answering the Libel Herein,
United States of America Says:

Thirty-first: If the libelant was injured as described in the libel, his injuries resulted from risks and dangers which were open, obvious and apparent, which he fully understood and which he assumed when he became a member of the crews of the steamers Missouri and Illinois.

Further Answering the Libel Herein,
United States of America Says:

Thirty-second: At all of the times mentioned in the libel, the libelant was a civilian employee of the United States through the Department of Commerce, Inland Waterways Corporation, a corporation created pursuant to Title 49, United States Code, Section 151 et seq. As such a civilian employee, the libelant was entitled to the benefits of the Federal Employees' Compensation Act, 5 United States Code, Section 751 et seq., and said remedy was exclusive of all others.

Wherefore, the respondent prays that the libel herein be dismissed, the proceeding being a suit against it without its consent, not within the scope of the Public Vessels Act, 46 United States Code, Sections 781 to 790 inclusive, nor within the scope of the Suits in Admiralty Act,

46 United States Code, Sections 741 to 752 inclusive, nor sanctioned by any other statute or provision of law.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address, Room 1003, U. S. Court House, Foley Square, New York 7, N. Y.

(Verified by Howard F. Fanning, May 4, 1954.)

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed April 29, 1955

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The respondent, for its exceptive allegations, respectfully shows:

1. At all times set forth in the libel the towboat Missouri, the vessel referred to in Article Second of the libel, was a public vessel of the United States, publicly operated and employed as a merchant vessel.

2. At the time of the injury alleged in the libel, libelant, a deckhand and member of the crew of the towboat Missouri, was a civilian employee of the United States through the Inland Waterways Corporation, a wholly owned incorporated agency of the United States, created pursuant to the provisions of Title 49 U. S. C. 151 et seq.

3. As such civilian employee, libelant was entitled to the benefits of the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

4. By reason of the premises the libel fails to state a cause of action within the jurisdiction of this Honorable Court for the reason that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. 751 et seq.

[fol. 54] Wherefore, respondent prays that the libel herein be dismissed with costs.

J. Edward Lumbard, United States Attorney, Proctor for Respondent, Office & P. O. Address, 607 U. S. Court House, Foley Square, New York 7, N. Y.

In the United States District Court
for the Southern District of New York

Memorandum Endorsed on Motion Papers
July 18, 1955

Respondent's exceptive allegations are sustained and the libel dismissed. See *Sullivan* v. *United States* (S. D. N. Y. 1955) 130 F. Supp. 53 and *Patterson* v. *United States* (S. D. N. Y. 1955) 129 F. Supp. 794.

Dated: July 18, 1955.

Sgd. Alexander Bicks, United States District Judge.

[fol. 55]

In United States District Court
Eastern District of New York

Albert Vallebuona, Libelant,

against

United States of America, Respondent.

Libel—Filed February 23, 1954

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The libel of Albert Vallebuona, against the United States of America in an action under the Public Vessels Act, Suits in Admiralty Act.

First: That at all the times hereinafter mentioned, the respondent was and is a corporation sovereign, which has by law consented to be sued.

Second: That upon information and belief, that at all the times hereinafter mentioned, the respondent was the owner of a certain steamship or vessel known as the BC 6034.

Third: That at all the times hereinafter mentioned, the respondent managed, operated and controlled the aforementioned vessel.

Fourth: That at all the times hereinafter mentioned, the libelant, Albert Vallebuona, was employed aboard the [fol. 56] aforementioned vessel in the capacity of seaman, as deckhand.

Fifth: That at all the times hereinafter mentioned, all the officers and crew of the aforementioned vessel were in the employ of the respondent.

Sixth: That the Admiralty Division of the United States District Court for the Eastern District of New York has jurisdiction of the subject matter as well as the parties to the action.

Seventh: That this Court has jurisdiction of the above entitled action by reason of the Public Vessels Act.

Eighth: That this Court has jurisdiction of the above entitled action by reason of the Suits in Admiralty Act.

Ninth: That at all the times hereinafter mentioned, there was in force and effect a law commonly known as the Jones Act, to the benefit of which the libelant is entitled.

Tenth: That at the time of the filing of this libel, the vessel aforementioned was within or about to come within the jurisdiction of the Eastern District of New York.

Eleventh: The libelant is a resident of the Borough of Richmond, City and State of New York, and within the jurisdiction of this Honorable Court.

Twelfth: That on or about the 10th day of March, 1952, while libelant was carefully, properly and prudently aboard

the aforementioned vessel in the performance of duties therein, he was suddenly and without any notice or warning caused to be injured as a result of the respondent, its servants, agents and employees, in failing to give any or proper [fol. 57] signals to the master of the tug, so as to cause the rope which the libelant was holding to become taut and causing his left leg to be crushed up against the bit and as a result thereof, the plaintiff sustained severe, painful and permanent injuries to his leg as hereinafter more particularly described. That the respondent was further at fault in failing, neglecting and omitting to give libelant any or proper signals or warnings of their intentions of moving the tug and barge. That the respondent failed, neglected and omitted to have any or proper signals between the mate, the libelant and the employees on the tug, so that the libelant could ascertain in which direction the tug was going to proceed and the respondent was further at fault in failing, neglecting and omitting to have any or proper competent employees aboard the said vessel at the time and place heretofore mentioned constituting said vessel unseaworthy, all of which resulted in the libelant sustaining the injuries hereinafter more particularly alleged, and the respondent, its servants, agents and employees were otherwise careless, reckless and negligent in the premises without any fault or contributory negligence on the part of the libelant.

Thirteenth: That by reason of the foregoing, the libelant was caused to sustain severe, painful and permanent injuries to his person, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby, and libelant may be required to incur obligations for medical and surgical aid and attendance and nursing care, and libelant was otherwise injured all to his damage in the sum of Three Hundred Thousand ($300,000.00) Dollars.

Fourteenth: That all and singular the foregoing matters are true and within the Admiralty and Maritime juris- [fol. 58] diction of the United States and of this Honorable Court, and that the respondent be required to answer upon oath, all and singular the matters aforesaid, and that this

Honorable Court may be pleased to decree payment of your libelant's claim.

Wherefore, libelant prays that the respondent be required to appear and answer all and singular the matters aforesaid and that this Honorable Court may be pleased to decree payment of your libelant's claim for damages in the sum of Three Hundred Thousand ($300,000.00) Dollars, together with the costs and disbursements of this action, and that libelant may have such other and further relief as to this Court may seem just and proper.

Jacob Rassner, Proctor for Libelant, Office & P. O. Address, 15 Park Row, Borough of Manhattan, City of New York.

[fol. 59]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RESPONDENT'S EXCEPTIVE ALLEGATIONS—Filed June 16, 1954

To the Honorable the Judges of the United States District Court for the Eastern District of New York:

The respondent, appearing specially, for its exceptive allegations, respectfully shows:

1. At all of the times set forth in the libel the libelant was a civilian employee of the respondent, acting by and through the Department of the Army, and assigned to the Terminal Operations Division, Harbor Craft Branch, Operations Section of the Department of the Army, at the New York Port of Embarkation, in the Borough of Brooklyn, City and State of New York.

2. At all of the times set forth in the libel, army barge BC-6034, referred to in Article Second of the libel, was a public vessel of the United States engaged in the public service.

3. Upon information and belief, heretofore on or about the 10th day of March, 1952, libelant was injured while engaged in the performance of his duties on the said army barge BC-6034.

4. Thereafter, pursuant to the provisions of the Federal Employees' Compensation Act, as amended, 5 U. S. C., Section 751 et seq., libelant filed a "Claim for Compensation on Account of Injury", with the United States Employees' Compensation Commission and the Bureau of Employees' Compensation did subsequently make and file a "Compensation Order—Award of Compensation" directing [fol. 60] payment to the libelant from the Employees' Compensation Fund of accrued compensation amounting to $126.47 for the period April 1 to April 22, 1952, inclusive, and $40.24 per week during total disability of the libelant, a copy of which order is hereto annexed, marked Exhibit A and made a part hereof.

5. Said "Compensation Order—Award of Compensation" was thereafter modified on September 15, 1953 by increasing the award to $41.69 per week for the period from July 1, 1953 to January 6, 1959 and annexed hereto, marked Exhibit B and made a part hereof, is a copy of the "Compensation Order—Modification of Award" made and filed by the Bureau of Employees' Compensation.

6. Pursuant to and in accordance with the terms of the compensation order awarding compensation to the libelant, as set forth in paragraphs 4 and 5, hereof, payments were duly made to the libelant from the Employees' Compensation Fund and libelant accepted and detained said payments.

7. By reason of the premises this Honorable Court lacks jurisdiction over the respondent and the subject matter of this suit on the ground that the sole and exclusive remedy of the libelant lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C., Section 751 et seq.

Wherefore, respondent prays that the libel herein be dismissed.

Leonard P. Moore, United States Attorney, Proctor for Respondent, Appearing Specially, Office & P. O. Address, 1003 U. S. Court House, Foley Square, New York 7, N. Y.

[fol. 61]

EXHIBIT A TO RESPONDENT'S EXCEPTIVE ALLEGATIONS

COMPENSATION ORDER AWARD OF COMPENSATION

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Form CO-4
(Rev. Jan. 1953)

Case No. X-721293

In the matter of the claim for compensation under the Federal Employees' Compensation Act of

ALBERT J. VALLEBUONA,

Claimant,

Employed by:

NEW YORK PORT OF EMBARKATION, BROOKLYN, N. Y.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and after due consideration of such claim and reports of record, the Bureau makes the following:

FINDINGS OF FACT

That on March 10, 1952 the claimant above-named while in the employ of the employing establishment above-named sustained personal injury in the performance of duty which resulted in amputation of left foot and ankle.

That timely notice of injury and claim for compensation were respectively given and filed;

That the monthly pay as determined pursuant to Section 12 of the Federal Employees' Compensation Act is the equivalent of $53.65 per week;

That as a result of such injury the claimant has permanent disability equivalent to 100% permanent total loss of left leg.

That the claimant is entitled to augmented compensation for dependents;

[fol. 62] That for such permanent disability and pursuant to Section 5 of the Federal Employees' Compensation Act the claimant is entitled to 288 weeks' compensation at the rate of $40.24 per week for the period July 1, 1953 to January 6, 1959, inclusive;

Upon the foregoing findings of fact it is ORDERED that there shall be paid from the Employees' Compensation Fund the following:

AWARD

Accrued compensation as follows: the sum of $126.47 covering the period July 1, 1953 to July 22, 1953, inclusive; less $126.47 previously paid from July 1, 1953 to July 22, 1953, inclusive.

Compensation shall thereafter be paid at the rate of $160.96 each four weeks for the period July 23, 1953 to January 6, 1959 inclusive.

Given under my hand at Washington, D. C. this 31 day of July, 1953.

REL:gt

cc:

Mr. Albert J. Vallebuona
1448 Hylan Blvd., Staten Island 4, N. Y.

Chief, Civilian Personnel Branch,
Headquarters, New York Port of
Embarkation, Brooklyn 50, N. Y.

Chief, Retirement Division
U. S. Civil Service Commission
Washington, D. C.
"H" Division

WM. MCCAULEY
Director
/s/ M. E. CASWELL
(Miss) M. E. Caswell
Chief of Section

[fol. 63]

EXHIBIT B TO RESPONDENT'S EXCEPTIVE ALLEGATIONS
COMPENSATION ORDER MODIFICATION OF AWARD

U. S. DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

Case No. X-721293

In the matter of the claim for compensation under the Federal Employees' Compensation Act of

ALBERT J. VALLEBUONA,

Claimant,

Employed by:

DEPARTMENT OF THE ARMY (New York Port of Embarkation, Brooklyn, New York).

Findings of fact, award of compensation, was filed in the above-entitled case on July 31, 1953 awarding claimant 288 weeks compensation at the rate of $40.24 per week from July 1, 1953 to January 6, 1959, inclusive, for 100% permanent total loss of the left leg based on a monthly pay, the equivalent of $53.65 per week as determined pursuant to Section 12 of the Federal Employees' Compensation Act. On the Director's own motion the file was reviewed and upon consideration thereof and after such investigation in respect thereto as is considered necessary, the Director makes the following:

FINDINGS OF FACT

That mistakes were made with respect to the determination of the claimant's pay rate and rate of compensation. That the monthly pay rate as determined pursuant to Section 12 of the Federal Employees' Compensation Act is [fol. 64] the equivalent of $55.58 per week; that the claimant is entitled to compensation at the rate of $41.69 per week.

Upon the foregoing findings of fact the Director makes the following:

AMENDED AWARD

That the award of July 31, 1953 be and the same is hereby MODIFIED as follows:

That there shall be paid from the Employees' Compensation Fund the claimant above named for 100% permanent total loss of the left leg compensation of 288 weeks at the rate of $41.69 per week from July 1, 1953 to January 6, 1959.

Given under my hand at Washington, D. C. this 15th day of September, 1953.

WM. MCCAULEY
Director
by: /s/ M. E. CASWELL
(Miss) M. E. Caswell
Chief of Section

cc:

Mr. Albert J. Vallebuona
1448 Hylan Blvd.
Staten Island, New York

Chief, Civilian Personnel Branch
Headquarters, New York Port of
Embarkation, Brooklyn 50, New York

Chief, Retirement Division
U. S. Civil Service Commission
Washington, D. C.
"H" Division

(Verified by Benjamin H. Berman, June 16, 1954.)

[fol. 65]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION OF INCH, D. J.—July 22, 1954

Appearances:

Leonard P. Moore, U. S. Attorney, Proctor for Respondent, appearing specially.

Jacob Rassner, Proctor for Libellant.

This is an action under the Public Vessels Act and the Suits in Admiralty Act. The libel also alleges that libelant is entitled to the benefits of the Jones Act. It appears from the allegations of the libel that libelant was employed by the United States of America in the capacity of a seaman, i.e. as a deckhand, aboard a vessel owned and operated by the Government. The Government has filed exceptive allegations to the effect that since libelant was a civilian seaman employed on a public vessel his exclusive remedy lies under the Federal Employees' Compensation Act, so that this Court lacks jurisdiction of the subject matter of this action. (*Johansen* v. *United States*, 343 U. S. 427; *Benet* v. *The General M. L. Hersey et al.*, 113 F. Supp. 826; *Bookard* v. *United States*, decided by Judge Rayfiel on September 28, 1953.) The exceptive allegations further allege that libelant filed a claim for compensation for the injury under the Act and that the benefits of an award have been paid and accepted by libelant.

[fol. 66] To be sure, the Government in effect seeks a form of summary judgment, and its exceptive allegations may not be sustained if there exists a substantial issue of fact which should await trial. (*Reconstruction Finance Corp.* v. *The Pueblo*, 97 F. Supp. 2, 4; *C. H. Sprague & Son Co.* v. *Howard*, 68 F. Supp. 348.) However, the libel on its face indicates that libelant was a civilian seaman employed on a public vessel, and the affidavit of his proctor submitted on this application does not dispute that fact. Accord-

ingly, the exceptive allegations must be sustained and the libel dismissed on the above cited authorities.

Settle order.

Robert A. Inch, U. S. D. J.

Dated: July 22, 1954.

[fol. 67]

In United States District Court
Eastern District of New York

Order Sustaining Exceptive Allegations and Dismissing Libel—July 27, 1954

The respondent, appearing specially, having filed exceptive allegations herein and the hearing thereon having duly come on before this Court on July 21, 1954,

Now on reading the libel, respondent's exceptive allegations, notice of hearing dated June 23, 1954 and the affidavit of Jacob Rassner sworn to July 21, 1954, and after hearing Leonard P. Moore, United States Attorney (Benjamin H. Berman, Attorney, Department of Justice), proctor for the respondent and Jacob Rassner, Esq., proctor for the libelant, and upon filing the memorandum of the Court dated July 22, 1954; it is

On motion of Leonard P. Moore, United States Attorney, proctor for the respondent herein

Ordered that the respondent's exceptive allegations herein be and the same hereby are sustained; and it is

Further Ordered that the libel herein be and the same hereby is dismissed.

Dated: Brooklyn, New York, July 27, 1954.

Robert A. Inch, Chief Judge of the United States District Court.

[fol. 68]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 302, 303, 305 & 306.

Docket Nos. 23668, 23669, 23854 & 23855

JAMES S. PATTERSON, as Administrator, Appellant,

v.

UNITED STATES, Appellee.

LEONARD LESTER SULLIVAN, Appellant,

v.

UNITED STATES, Appellee.

MELVIN A. HAYS, Appellant,

v.

UNITED STATES, Appellee.

STERLING EUGENE DUNCAN, Appellant,

v.

UNITED STATES, Appellee.

OPINION—July 11, 1958

[fol. 69] Before: Hand, Hincks and Moore, Circuit Judges.

All these appeals come up from decrees in suits in the admiralty, dismissing libels upon exceptive allegations of the respondent. The libels sought to recover for personal injuries suffered upon "merchant vessels," owned and operated by the United States.

Jacob Rassner and Irwin Asofsy, for the appellants.

Leavenworth Colby, for the appellees.

HAND, Circuit Judge:

These four decrees, entered by Dimock, J., Kaufman, J., Palmieri, J. and Bicks, J., in the order in which the titles are arranged herein, dismissed libels *in personam* to recover for injuries suffered by civil employees of the United States, upon ships, owned and operated by the United States. Patterson is the administrator of one, Doody, who was killed while employed as a machinist on a ship owned and operated by the War Shipping Administration although he was not employed "through" that Administration, and was not therefore covered by the "Clarification Act" of 1943 (50 U. S. Code Appendix §1291). It is to be assumed that Doody met his death because of the unseaworthiness of the ship, or the negligence of those in charge of her, and that his administrator could recover, if the claim arose under the Suits in Admiralty Act (46 U. S. C. §741). Sullivan, Hays and Duncan were all civil service seamen, employed as such upon "merchant vessels," publicly owned and operated ships of the United States. They too sued for injuries suffered under circumstances that would have [fol. 70] entitled them to a recovery, had they been individually employed "through" the War Shipping Administration. All were entitled to compensation under the Federal Employees Compensation Act (5 U. S. Code 751 *et seq.*) and the question in all the suits is whether that was their exclusive remedy, or whether the Suits in Admiralty Act (48 U. S. C. 741 *et seq.*) was also open to them.

In *Johansen* v. *United States*, 343 U. S. 247, the Supreme Court held that a person injured on board a "Public Vessel" owned and operated by the United States might not recover under the Public Vessels Act (46 U. S. C. §781 *et seq.*), his only recourse being under the Federal Employees Compensation Act. The only question before us is therefore whether the same reasoning applies to suits under the Suits in Admiralty Act. In *Johansen's* case the vessel was a troop transport, and could not be regarded as in any

sense a "merchant vessel"; in the case at bar the opposite was true, as we have already said. Save for one consideration that we shall mention in a moment, it might be hard to understand why the language of the Suits in Admiralty Act should not apply: "In cases where if such vessel were privately owned and possessed, * * * a libel in personam may be brought * * * provided that such vessel is employed as a merchant vessel." (46 U. S. C. §742.) Indeed such a conclusion would be reinforced by the preceding section (§741) that forbids the creation of maritime liens on "merchant vessels" of the United States such as would arise if the "merchant vessel" were privately owned. On the other hand, if the proper purport of §742 was generally to assimilate claims against the United States for injuries arising on its "merchant vessels" to those arising in the case of privately owned ships, the "Clarification Act" of 1943 was unnecessary which limited the same relief to "seamen" "employed on United States * * * vessels through the War [fol. 71] Shipping Administration." The Fourth Circuit in *United States* v. *Marine*, 155 Fed. (2) 456, had held that the Suits in Admiralty Act did apply, although the libellant was not employed "through the War Shipping Administration"; and, as a new question, it might have been held that the grant of a claim by the Clarification Act of 1943 did not inevitably presuppose that such claims had not been already covered by the Suits in Admiralty Act. However, the Supreme Court in *Johansen* v. *United States*, *supra* (p. 439), specifically declared that *United States* v. *Marine*, *supra*, was not rightly decided and made no distinction between it and a libel under the "Public Vessels Act." Moreover, the Eighth Circuit in *Inland Waterways Corporation* v. *Doyle*, 204 Fed. (2) 874, although it did distinguish between "public vessels" and "merchant vessels," declared (p. 878): "We have no hesitation in saying that we can conceive no sound reason for making a distinction with respect to remedies between civilian seamen employed by the United States on its 'public vessels.'" It appears not to have observed the disapproval of *United States* v. *Marine*, *supra*, 155 Fed. (2) that we have just mentioned. We feel bound to hold that the Court did not mean to recognize any such distinction which we too

think is not "sound." As *res integra*, there was indeed more reason for reading broadly the "Public Vessels Act" (46 U. S. C. §781) than the "Suits in Admiralty Act" (46 U. S. C. §782) because the "Public Vessels Act," is not subject to the implication arising from the express grant of relief to employees of the War Shipping Board, that is relevant in the interpretation of the "Suits in Admiralty Act."

As for the Clarification Act of 1949 (63 St. L. 854), it is altogether clear that the subsection 2 of §201 and §305(b) were not intended to do more than leave untouched the rights of seamen as they already were (*Johansen* v. *United States*, *supra*, 436-438).

The decrees are affirmed.

[fol. 72]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 304—October Term, 1957.

Docket No. 23702

ALBERT VALLEBUONA, Appellant,

v.

UNITED STATES, Appellee.

Before: Hand, Hincks, Circuit Judges.

On appeal from a decree in the admiralty, Inch J., presiding, dismissing a libel to recover injuries suffered by a civilian seaman of the Army under the Suits in Admiralty Act.

Jacob Rassner and Irwin Asofsy, for the appellant.

Leavenworth Colby, for the appellee.

PER CURIAM—July 11, 1958

Decree affirmed on the authority of *Patterson* v. *United States* and three other cases handed down herewith.

[fol. 73]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES S. PATTERSON, General Administrator for Mobile County Alabama, as Administrator of the Estate of EDGAR A. DOODY, JR., deceased, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 74] [File endorsement omitted]

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD LESTER SULLIVAN, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 76] [File endorsement omitted]

[fol. 77]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALBERT VALLEBUONA, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 78] [File endorsement omitted]

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELVIN A. HAYES, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 80] [File endorsement omitted]

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STERLING EUGENE DUNCAN, Libelant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee.

JUDGMENT—July 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Soutehrn (sic) District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 82] [File endorsement omitted]

[fol. 83] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 84]

SUPREME COURT OF THE UNITED STATES

No. 429—October Term, 1958

JAMES S. PATTERSON, General Administrator for Mobile County, Alabama, etc., LEONARD LESTER SULLIVAN, MELVIN A. HAYS, et al., Petitioners,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—November 24, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.